No. 91-7804

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

SHELDON B. BUFFERD, Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

BRIEF OF AMICUS CURIAE ON THE MERITS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does the express language of §6037 of the Internal Revenue Code permit the Commissioner to adjust the taxable income of an S corporation after the statute of limitations on the corporation's return has run?

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INTEREST OF AMICUS CURIAE

Amici Curiae[1] are members of the Washington State Bar whose practice focuses on federal tax planning and resolution of federal tax controversies. They were counsel for the taxpayer in *Kelley v. Commissioner*, 877 F.2d 756 (9th Cir. 1989). Their interest is that this Court fully be advised of the origins and effect of the law governing Subchapter S corporations under the Internal Revenue Code of 1954.

SUMMARY OF ARGUMENT

Section 6501(a) of the Internal Revenue Code provides a three-year period of time from the date of filing a "return" during which the Internal Revenue Service may adjust any items on that filed "return" and assess an income tax imposed by the Code. If, within the period of limitations on that "return" the Service concludes that adjustments should be made to that "return" the Service may assess income tax imposed by the Code on either the person who filed that "return," or another related person whose return is based (in part) on that return and whose period of limitations is also open.

The clear and straightforward meaning of the term "return" in §6501(a) as further described in the second sentence of §6037(a), makes it irrelevant whether an income tax is assessed against the S corporation. Therefore, the Service may not adjust items on the S corporation's income tax return more than three years after that return was filed.

The Subchapter S corporation was created in 1958. At its inception, it was subject to no income tax whatsoever. It was required to file an income tax return and provide an

[1] Pursuant to United States Supreme Court Rule 37.3, *amici* have obtained the written consents of all parties, which accompany this brief.

information statement to shareholders. The information statement contained no breakdown of the character or derivation of the corporation's income or loss. The effect was the same as receiving a dividend statement from a C corporation. The treatment of all items of expense, income, deduction, and credit were determined at the corporate level and a shareholder may not have access to those records.

Section 6037, which was enacted at the same time as the subchapter S corporation, expressly applied the statute of limitations under §6501 to the return filed by the Subchapter S corporation. At the time it was enacted, a Subchapter S corporation was not liable for any income tax. A separate Section 6037 was unnecessary if its only purpose was to describe the application of the statute of limitations to a failed Subchapter S corporation. A small change to the recently enacted §6501(g) would have sufficed.

Section 6037 is clear and unequivocal on its face and resort to legislative history is unnecessary. The biggest problem with the legislative history is that it can and has been contorted by the government and the Second Circuit. The contortion occurs by taking the words "for example" and concluding that they are surplusage; that the "example" is the definition. To the extent that the legislative history is probative, it supports the petitioner's position. The legislative history of the 1982 amendments to the IRS are even less probative as to the meaning and interpretation of §6037 than the history in 1958.

Section 6037 is not analogous to §6501(g) of the Code. Section 6501(g) was in the Code when §6037 was adopted by Congress. If Congress had wanted to provide a provision like §6501(g) for subchapter S corporation it could have done so.

The final argument for the interpretation of §6037 by the *Kelley* court is the potential for inequitable and incongrous results to the shareholders of a Subchapter S corporation.

The sole sources of information on any of the items of income and expense are the corporation's return and the corporation's books. It is the corporation's taxable income or loss. Neither the Internal Revenue Service nor anyone else can determine the taxable income or loss of the corporation without exclusive reference to the corporation's return and records. Congress recognized this in 1958 and provided that the corporation's return was a "return" for purposes of the statute of limitations.

ARGUMENT

I. The Technical Amendments Act of 1958 created a new entity under the Internal Revenue Code, the Subchapter S corporation, and established a Code section governing the status of its return.

The Technical Amendments Act of 1958 created an entirely new subchapter in the Internal Revenue Code and a new type of organization for tax purposes, the Subchapter S corporation. Subchapter S was added to the 1958 Act by the Senate; it was not a part of the original House Bill. S. Rep. 85-1983, 85th Cong. 2d Sess., 1958 U.S. Code, Cong. & Admin. News 5005.

The provisions of the Internal Revenue Code governing the Subchapter S corporations have changed markedly from their inception in 1958.[2]

The "Subchapter S corporation" and the post-1982 "S corporation" are not the same. At its inception, the

[2] The years at issue pre-date the Subchapter S Revision Act of 1982, which changed the shorthand description of "an electing small business corporation" from "Subchapter S corporation" to "S corporation." This brief uses the term as applied to electing small business corporations before the 1982 revisions.

Subchapter S corporation operated like a corporation for tax purposes. Items of income (except long-term capital gain) or loss lost their character when passed through to shareholders. The taxable income of the corporation was included in the shareholders' income as a dividend. IRC §1373(b) (as in effect before the 1982 amendments); S. Rep. 85-1983, 85th Cong. 2d Sess., 1958 U.S. Code, Cong. & Admin. News 5007. The "net operating loss" of the corporation was also passed through to the shareholders. IRC §1374 (as in effect before the 1982 amendments); S. Rep. 85-1983, 85th Cong. 2d Sess., 1958 Code, Cong. & Admin. News 5008. No separate characterization of each item generating income (except long-term capital gains) or loss was made. The Subchapter S corporation was just that - a corporation whose net income or loss was taxed to its shareholders. The Chairman of the Senate Finance Committee summarized Subchapter S, stating

> "[It] . . . permits shareholders in small-business corporations, in lieu of payment of the corporation tax, to elect to be taxed directly on the corporate earnings. When this method is elected, the shareholders include in their own income for tax purposes their share of the current taxable income of the corporation, whether distributed or not. 104 Cong. Rec. 17,034-17,035 (1958).

A new section of the Code was also added, governing the treatment of a Subchapter S corporation return. IRC §6037. The new section was separate from the general rules regarding the status of returns for the statutes of limitation in IRC §6501.

In 1982, the "S corporation" supplanted the "Subchapter S corporation." The treatment of an S corporation's income and loss was changed from a "corporate" model to a

"partnership" model. S. Rep. 97-640, 97th Cong. 2d Sess., 1982 U.S. Code, Cong. & Admin. News 3257-3258, reprinted at 1982-2 C.B. 718. No longer would there be a pass through of the corporation's taxable income or net operating loss. Instead, each item on the corporation's return that might affect the liability of any shareholder would be treated separately.[3]

The treatment of all items of expense, income, deduction and credit of a Subchapter S corporation is determined at the corporation level. A shareholder does not have personal possession of records to substantiate the deductions taken on the return. Further, a shareholder has limited rights to inspect corporate records. For example, under Connecticut law, a shareholder may obtain access only to certain records of a corporation.

2. The Second Circuit's analysis in Bufferd is not supported by the statutory language and legislative history of the 1958 law, creating the Subchapter S corporation and making its return a "return" for purposes of the statute of limitations.

Section 6037 came into the Internal Revenue Code in 1958, along with the Subchapter S corporation. It states, "any return filed pursuant to this section shall, for purposes of Chapter 66 (relating to limitations), be treated as a return filed by the corporation under §6012." The legislative history regarding §6037 states:

[3] There had been earlier proposals of this nature, but they had not been enacted. Bittker & Eustice, *Federal Income Taxation of Corporations and Shareholders*, §6.05, n. 56 (4th ed. 1979).

> Notwithstanding the fact that an electing small-business corporation is not subject to the tax imposed by Chapter 1 of the 1954 Code, such corporation must make a return for each taxable year in accordance with new §6037 as added by subsection (c) of §68 of the Bill. Such return will be considered as a return filed under §6012 for purposes of the provisions of Chapter 66, relating to limitations. Thus, for example, the period of limitation on assessment and collection of any corporate tax found to be due upon a subsequent determination that the corporation was not entitled to the benefits of Subchapter S, will run from the date of filing of the return required under the new §6037.

S. Rep. 85-1983, 85th Cong. 2d. Sess, 1958 U.S. Code Cong. & Admin. News 5014.

The Second Circuit concluded that the statutory language applies only where the Subchapter S corporation is "nonetheless required to pay some tax on the organization's income." *Bufferd v. Commissioner*, 952 F.2d 675, 677 (2nd Cir. 1992). The Court relies on the above-quoted legislative history as support for its conclusion that the statutory language applies only to limit the assessment of tax owed by the Subchapter S corporation.

The Second Circuit's analysis is flawed on two counts. First, its opinion ignores the statute governing Subchapter S corporations as enacted in 1958. As enacted, Subchapter S of the Internal Revenue Code of 1954 exempted an "electing small business corporation" from all income taxes. Section 1371(b)(1).

The express language states that, despite not being liable for any income tax, a Subchapter S corporation's return is a return for purposes of "Chapter 66 relating to limitations." §6037. When Subchapter S of the Internal Revenue Code

was enacted, no corporate tax would be shown on a Subchapter S corporation's return, but taxable income, and all necessary information to compute it would. The question becomes, to what "return" does §6501(a) refer?

If this Court determines that "return" clearly means the corporate return that contains the necessary supporting information to compute income and loss it need go no further. The plain meaning of the statute controls unless, in the rare case, the result is "demonstrably at odds with the intention of its drafters." *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989). It is not enough that a statute differs from "widely held expectations." *In re Roberts*, 906 F.2d 1440, 1443 (10th Cir. 1990). Only if the issue is not clear from the statutory language itself, is recourse to the legislative history appropriate. *In re Burns*, 887 F.2d 1541, 1544 (11th Cir. 1989).

The evidence needed to show that the plain words are not the intent of Congress must be compelling. "Invocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and in the end prevents effectuation of congressional intent." *Board of Governors v. Dimension Fin. Corp.*, 474 U.S. 361 (1986).

The legislative history of the Technical Amendments Act of 1958, which created Subchapter S of the Internal Revenue Code, is permeated with references to a Subchapter S corporation's exemption from income taxes. "Subchapter S is applicable to a 'small business corporation' which elects not to be subject to the income tax imposed by Chapter 1 of the 1954 Code . . . " S. Rep. 85-1983, 85th Cong. 2d. Sess., 1958 U.S. Code, Cong. & Admin. News 5005. The legislative history continues, "under §1372(b)(1), the effect on a small-business corporation of a valid election is to exempt the corporation from income tax for any taxable year with respect to which the election is in effect . . . " S.

Rep. 85-1983, 85th Cong., 2d Sess., 1958 U.S. Code, Cong. and Admin. News, 5005. "Notwithstanding the fact that an electing small-business corporation is not subject to [income tax]" its return is a return for purposes of the statute of limitations. *Id.* at 5014.

When §6037 was adopted, there was no income tax to be paid by a Subchapter S corporation under any provision of the Internal Revenue Code. Yet, Congress took the specific step of making the return of a Subchapter S corporation a return for purposes of the statute of limitations.

The Second Circuit hypothesizes that §6037 serves the same purpose as §6501(g). In reviewing the history of §6037 and §6501(g), this hypothesis is not supported. Section 6501(g) was part of the Internal Revenue Code, as adopted in 1954, and it had no counterpart in the Internal Revenue Code of 1939. *See Automobile Club of Michigan v. Commissioner*, 353 U.S. 180 (1957), *reh. denied*, 353 U.S. 989. As originally enacted, §6501(g) applied to entities which erroneously characterized themselves as partnerships, or exempt organizations, but which were actually corporations. Section 6501(g) provided limited relief by treating returns that otherwise would not trigger the running of the statute of limitations as returns for "purposes of this section."

Congress did not place the provision governing the status of a Subchapter S corporation return in the narrowly drawn Code §6501(g). Instead, it enacted a new section of the Internal Revenue Code. Furthermore, Congress chose much more expansive language for Code §6037, making a Subchapter S corporation's return a "return," "for purposes of Chapter 66 (relating to limitations)." Chapter 66 includes §6501. The choice of language and the decision by Congress to make the status of a Subchapter S corporation return the subject of a special section of the Code indicates

that the limited scope of §6501(g) was not what Congress intended when enacting §6037.

Differences in the language chosen by Congress should not be dismissed, as the Second Circuit appears to have done with the differences between §6501(g) and §6037.

> Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion. *Russello v. United States*, 464 U.S. 16, 23 (1983), citing *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972).

Neither are differences in Congress' choice of words to be dismissed by ascribing the same meaning to different language or treating the difference as "a simple mistake in draftsmanship." *Id.* The Second Circuit, in *Siben v. Commissioner*, recognized that the differences in the language between the Internal Revenue Code provisions governing partnerships and Subchapter S corporations rendered §6037 inapplicable to an entity other than Subchapter S corporation. 930 F.2d 1034, 1037 (2nd Cir. 1991).

The second flaw in the Second Circuit's analysis is its reading of the legislative history. The Court treated the example given in the Senate Report as a limitation on the statutory language. This violates the ancient maxim, *exempla illustrant non restringunt legem* (examples illustrate, but do not restrain, the law). Black's Law Dictionary, 571 (6th ed. 1990).

As this Court has noted, the ordinary meaning of "example" (involving an example in the regulations under §513 of the Internal Revenue Code) is "an illustration of one possible application" of a provision of the law. *United States v. American College of Physicians*, 475 U.S. 834 (1986).

This Court rejected an argument that an example in the Treasury regulations discussing unrelated business income of an exempt organization established a blanket rule. Likewise, in this case, the term, "for example" in the 1958 legislative history is an illustration of one possible result of Congress carving out a special rule for returns of Subchapter S corporations. The Treasury Regulations, adopted in 1959, repeat the language of the conference report, using the ineligible Subchapter S corporation as one "example." Treas. Reg. §1.6037-1(c). It appears that the Treasury did not interpret the example as a limitation on the scope of §6037 until litigation ensued.

The Second Circuit's interpretation of the legislative history as restricting the statute of limitations to assessment of income tax against the corporation repeats its error regarding the statute itself. A Subchapter S corporation was not liable for any tax on its income under Subchapter S of the Internal Revenue Code as originally enacted. Interpreting the example in the Conference Committee report as the only circumstance in which there is a separate application of the statute of limitations to the corporation's return does violence to the broad statutory language and Congress' choice of the situation as an example.

3. The interpretation of §6037 of the Internal Revenue Code by the Second Circuit would lead to incongruous and inequitable results.

Current Connecticut law acutely demonstrates the unfavorable position the *Bufferd* decision puts shareholders in with respect to locating, examining, and obtaining corporate records. Although shareholders of record are entitled to "reasonable" inspection of certain specified corporate information, such information is hard to get, limited, and falls

far short of giving shareholders the access necessary to meet the demands of potential Internal Revenue challenges.

According to Connecticut's statutory provisions, shareholders of record are entitled to inspect general corporate records such as balance sheets and profit and loss statements (as provided for in Conn. Gen. Stat. Ann. §33-307 (West 1989)) during business hours. Conn. Gen. Stat. Ann. §33-334(a).[4] To examine and make copies and extracts of the corporation's bylaws and its minutes of the meetings of shareholders, the shareholder is required to provide a written request to the corporation detailing a "reasonable and proper purpose" for the examination. Conn. Gen. Stat. Ann. §33-334(b). In each of these instances, shareholder recourse against corporate inaction is found in the courts.

These records, however, fall far short of that necessary to substantiate the bottom line income or loss from a Subchapter S corporation passed through to a shareholder's tax return and sustain it against an IRS challenge. Connecticut law provides procedures through which a shareholder can seek access to operational records of the corporation, but the process is far more difficult than suggested by the *Bufferd* court.

Conn. Gen. Stat. Ann. §33-334(c) provides that only through a court order can a shareholder examine and copy critical corporate books and records of account, and then only after "application by a shareholder of record, after notice to the corporation that it may show cause why such order should not be granted, and after hearing thereon . . ." Furthermore, access to this information is ". . . subject to limitations as said court or such judge may prescribe . . . ," meaning that some records could potentially be kept from the shareholder's reach. Finally, §33-334(c) puts upon the shareholder the burden of showing " . . . that the

[4] The substantive provisions of the statute are unchanged from the year at issue.

examination is in good faith in the interest of such shareholder as such or of the corporation . . ."

Ultimately, the Connecticut corporate law structure demonstrates the difficulties associated with shareholder access to basic, and in many cases critical, information concerning both corporate and individual finance and accounting. Aside from obtaining the basic general corporate records which are too limited to substantiate specific tax claims, the shareholder is required to make written request, prove good cause and "proper purpose," and ultimately obtain a judicial decree just to reach the step of gaining access to corporate records to substantiate the corporation's taxable income or loss.

The *Bufferd* court specifically downplayed this risk, asserting that a shareholder could take "protective steps with regard to the S corporation records needed to support the S corporation items claimed on the shareholder's return."[5] 952 F.2d at 678. As explained above, this overstates the access that a shareholder has to the internal records of a corporation. The risks of limited access are real and can expose a shareholder to adverse tax consequences, even where a shareholder attempts to obtain necessary information, but is unable to do so. *See e.g.*, Rev. Rul. 62-202, 1962-2 C.B. 344 (Minority shareholder of Subchapter S corporation who was not an officer or employee held liable for penalty for underpayment of estimated tax despite his futile efforts to obtain information from corporation needed to determine tax deposits.)

[5] The quoted language indicates that the court below may have incorrectly relied on the law after the 1982 amendments. Before the 1982 amendments, a Subchapter S corporation would not pass through specific items of income, expense, deduction or credit to a shareholder. Instead, only the corporation's total taxable income (with minor adjustments) or net operating loss were passed through. A shareholder in Compo for the 1979 tax year, for example, would not know which item on the corporation's return might be of interest to the Commissioner.

The Second Circuit's interpretation of §6037 opens the door to even more serious inequities.

> **Example 1:** A is a shareholder and owns 20% of X Co., a Subchapter S corporation. B and C, unrelated to A, own 80% of X. A is audited for 1982 and signs a Form 872-A extension of the statute of limitations. The audit focuses on issues other than A's investment in X Co. Ten years go by.[6] The Internal Revenue Service finally issues a statutory notice of deficiency, including a disallowance of a $10,000 loss from X Co. for the tax year 1982. The S corporation loss had not been raised as an issue previously. The records of X Co. have been destroyed.

The shareholder in the example has no means to compel the corporation to retain its records. As discussed above, the shareholder's ability to obtain access to the records is quite limited. The shareholder, in the above example, is completely unable to defend against the Commissioner's adjustments.

The example is not mere philosophical musing. In *Bufferd*, the extension agreement refers only to adjustments arising from a partnership return, but the Commissioner took the position below that the extension agreement also covered his proposed adjustments to the Subchapter S corporation return. 952 F.2d at 676.

The Internal Revenue Service has the ability to, and does, obtain extensions of the statute on the Subchapter S

[6] Form 872-A is an extension of the statute of limitations without any fixed termination date. The Second Circuit has held that there is no "reasonable time" limitation on the Form 872-A extension. *Stenclik v. Commissioner*, 907 F.2d 25 *cert. denied* ___ U.S. ___, 111 S.Ct. 516 (1990).

corporation return.[7] *See Kelley v. Commissioner*, 877 F.2d at 757; *Bufferd v. Commissioner*, T.C. Memo 1991-170, 61 TCM [CCH] 2410, 2411; *Jacobson v. Commissioner*, T.C. Memo 1987-559, 54 TCM [CCH] 1043. It is at the corporate level that all necessary information concerning the corporate return will be found. A shareholder for years before 1983 will have no information relevant to the corporation return, other than a raw number indicating gain or loss. *Ketchum v. Commissioner*, 697 F.2d 466, 469 (2d Cir. 1982). The shareholder therefore would have no information to show how the bottom line income or loss was determined. Basic principles of fairness weigh in favor of applying the statute at the corporate level.

> The shareholder can defend against such an adjustment (to a Subchapter S corporation's return) only by resort to the corporation's books and records. The statute of limitations exists, in part, so that after some time persons can be confident that their affairs are closed and they can dispose of old records. An S corporation should be entitled to the same finality as others, yet if any of the shareholders has given an extension of the statute of limitations to the IRS the shareholder's ability to defend against the adjustment would depend upon whether the corporation has retained the records.

Kelley v. Commissioner, 877 F.2d at 756. The adjustment to the shareholder's return may, in fact, be triggered by the Commissioner's earlier audit of the corporation. *See e.g., Ketchum v. Commissioner*, 697 F.2d at 467.

The interpretation given §6037 by the Second Circuit would create multiple statutes of limitations applicable to a

[7] It appears that the Service not only solicits extensions from the subchapter S corporation, but does so as a policy.

single Subchapter S corporation return, depending on the nature of the adjustment proposed.

> **Example 2:** Assume that an accrual method Subchapter S corporation had a taxable year ending February 28, which is a different taxable year than its shareholders. This was a standard tax planning strategy for the years at issue and a not uncommon situation now. All of the stock of the Subchapter S corporation was owned by husband and wife, both of whom are cash method, calendar year taxpayers, and that the corporation leased property from the shareholders. On March 31, 1977, the husband died, leaving his half of the stock to a trust created under his Will.
>
> The Internal Revenue Service audits the corporate return. It determines that the Subchapter S election terminated because the trust was an ineligible shareholder, which voids the Subchapter S election as of March 1, 1977 (termination at that time was retroactive to the first day of the year of termination). The Internal Revenue Service also determines that the corporation's accrued but unpaid rental expenses were not deductible because the cash-method shareholders had not yet included them in income, under IRC §267.
>
> The shareholders and the corporation disagree with these determinations, contending that the Subchapter S election has not terminated because the executor of husband's estate has not yet distributed the estate assets to the beneficiaries, including the trust (an estate is an eligible shareholder in a Subchapter S corporation). Applying the results reached by the

Second Circuit in this case and assuming that all returns were timely filed, the statute of limitations with respect to the Subchapter S corporation for its year ending February 28, 1978 would expire May 15, 1981, and the statute of limitations with respect to adjustment regarding the rental expense would expire April 15, 1982, provided that the Internal Revenue Service was correct regarding termination of the Subchapter S election. If the shareholders were correct in their assertion that the estate, rather than the trust, held the Subchapter S stock, then the statute of limitations for both issues would expire April 15, 1982.

The statute of limitations anomalies created by the Second Circuit's interpretation are not cured by the application of the consolidated audit procedures to S corporations. *See Arenjay v. Commissioner*, 920 F 2d 269 (5th Cir. 1991). The consolidated audit procedures do not apply to many S corporations. Under current law, related adjustments, from the same return may still be subject to different statutes of limitations.

Example 3: Z is a calendar year S corporation. Until 1988, it had been a regular corporation, and has substantial "earnings and profits." Z owns a large shopping center. It also operates a retail widget store. In 1990, the widget market is terrible. In 1990 Z undertakes repairs to part of the shopping center. It deducts the repairs and passes a $50,000 deduction to its shareholders attributable to the expense of the repairs. Net rents from the other shopping center tenants account for 20% of Z's gross receipts.

Because Z has a Subchapter C "earnings and profits," it could be liable for tax if its net rental (and other passive) income exceeds 25% of its gross receipts. IRC §1375. Z determines that it is not liable for the tax because its net passive income is only 20% of the gross receipts. Z timely files its 1990 return on March 15, 1991.

D, a shareholder, also timely files his 1990 return on April 15, 1991. The Commissioner believes Z should have capitalized the repair costs. Removing the $50,000 deduction will put Z's net passive income over the 25% threshold, triggering liability for tax under §1375.

Under the Second Circuit's analysis, the statute of limitations for denying the repair expense, on which the §1375 tax liability is based expires April 15, 1994, but the statute of limitations for the tax itself expires a month earlier.

4. It is not appropriate to rely on the legislative history of the 1982 amendments to the Internal Revenue Code to ascertain the intent of Congress in 1958.

In 1982, Congress substantially modified the Internal Revenue Code. The Tax Equity and Fiscal Responsibility Act (TEFRA), P.L. 97-248, established a consolidated audit procedure for most partnerships. IRC §6221 et. seq. The audit rules under TEFRA did not extend to Subchapter S corporations. Later in 1982, Congress enacted the Subchapter S Revision Act of 1982. P.L. 97-354. The Act added §§6241-6245 to the Code. P.L. 97-354, §4(a). The

amendments made the audit procedures for partnerships, enacted under TEFRA, applicable to Subchapter S corporations. IRC §6244. The legislative history includes a statement of "present law" that:

> [A]ny issues involving the income or deductions of a Subchapter S corporation are determined separately in administrative or judicial proceedings involving the individual shareholder whose tax liability is affected. The statute of limitations applies at the individual level, based on the returns filed by the individual. The filing by the corporation of its return does not affect the statute of limitations applicable to the shareholders.

S. Rep. 97-640, 97th Cong. 2d. Sess., 1982 U.S. Code Cong. & Admin. News 3275 reprinted at 1982-2 C.B. 718. The *Bufferd* Court relied on a discussion of this legislative history of §6037 by the Tax Court in *Felhaber v. Commissioner*, 94 T.C. 863 (1990) *aff'd* 954 F.2d 653 (11th Cir. 1992).

The Tax Court, in turn, relied on the quoted 1982 legislative history as demonstrating the intent of the original drafters of the bill. *Felhaber v. Commissioner*, 94 T.C. at 867. The interpretation of the later legislative history is not a substitute for the intent of the Congress that enacted §6037. As this Court has long held, ". . .it is well settled that the 'views of a subsequent Congress form a hazardous basis for interring the intent of an earlier one." *Russello v. United States*, 464 U.S. at 26, *quoting Jefferson County Pharmaceutical Assn. v. Abbott Laboratories*, 460 U.S. 150, 165, n.27 (1983), *quoting from United States v. Price*, 361 U.S. 304, 313 (1960).

The risk is particularly great where the later legislative history does not identify the source for its conclusion

regarding the "present law." Here, the later statement relied upon may also be interpreted to be a recitation of the status of the scant caselaw that had developed under §6037. [8] Even if the basis for the statement in the legislative history of the 1982 amendments were clear, this Court has stated its reluctance to permit a later Congress to state the intent of an earlier one. That reluctance should be no less where the later legislative history is inconclusive. *United States v. American College of Physicians*, 475 U.S. at 846-847 (1986).

The Court in *American College of Physicians* was faced with a situation similar to these facts. A later Congress, in its statement of the "Present Law" adopted a particular reading of a statute. The Court declined to adopt an argument by the United States that the later legislative history established what the law had been before. This Court noted that several readings of the later legislative history were possible, including "the Committee's intention affirmatively to endorse what they believed to be existing practice . . ." 475 U.S. at 846. The 1982 legislative history may only be endorsing the view of the statute put forth in the *Leonhart* decision.

Instead of relying on an interpretation by a Congress, a quarter century later, the Court should look to the 1958 act, recognizing the substantial departure that Subchapter S represented by creating a non-taxable entity separate from its

[8] The only case before *Kelley v. Commissioner*, 877 F.2d 756 (9th Cir. 1989) to address the meaning of §6037 was an unreported decision of the Tax Court. *Leonhart v. Commissioner*, T.C. Memo 1968-98 *aff'd per curiam on other issues*, 414 F.2d 749 (4th Cir. 1969). The precedential value of Leonhart is very limited. The statute of limitations issues was apparently not raised before the Court of Appeals. The Tax Co[redacted] does not consider it memorandum decisi[redacted] and has [redacted] policy against citing [redacted]. *See e.g. Gale v. Commissioner*, 17 T.C. 1458, 1459 (1952) *rev'd* 210 F.2d [redacted] Cir. 1954). *See also* 2A Casey, Federal Tax Practice, §8.38 (1981).

owners, the broad scope of the language of §6037, Congress' decision to keep §6037 separate from IRC §6501(g) and the broad language of the legislative history.

CONCLUSION

For the forgoing reasons the judgment of the court of Appeals should be reversed.

Respectfully submitted,

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